



Paper No. 10

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OFFICE OF PETITIONS

In re Application of
Lawson et al.

Application No. 60/339,074

Filed: December 12, 2001

Attorney Docket No. 3837

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:DECISION DENYING PETITION
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This is a decision on the renewed petition filed September 26, 2003, requesting under 37 CFR 1.10(d), or in the alternative, under 37 CFR 1.183 to waive the rules, to accord the above-identified application a filing date of November 9, 2001, rather than the currently accorded filing date of December 12, 2001.

The petition considered under 37 CFR 1.10(d) is **DENIED**.

The petition considered under 37 CFR 1.183 is **DENIED**.

BACKGROUND

The above-identified provisional application papers were found to be complete for purposes of obtaining a filing date by the Office of Initial Patent Examination and were accorded a filing date of December 12, 2001.

On March 25, 2002, applicants filed a petition under the provisions of 37 CFR 1.10(d) seeking correction of the filing date to November 9, 2001, the alleged date the correspondence was deposited in the Express Mail Post Office to Addressee service of the USPS.

The petition was dismissed in the decision of May 30, 2002.

A first renewed petition under 37 CFR 1.10(d) was filed July 1, 2002.

The first renewed petition was dismissed in the decision of July 25, 2002.

A second renewed petition under 37 CFR 1.10(d) was filed August 6, 2002. In the alternative, applicants requested suspension under 37 CFR 1.183 of the requirements of 37 CFR 1.10(d)(3), so as to accord the above-identified application a filing date of November 9, 2002.

The petition considered under both 37 CFR 1.10(d) and § 1.183 was dismissed in the decision of July 28, 2003.

The instant petition renewed under both 37 CFR 1.10(d) and § 1.183 was filed September 25, 2003.

STATUTE, REGULATION, AND EXAMINING PROCEDURE¹

35 U.S.C. § 2(b)(2) states: The Office may establish regulations, not inconsistent with law, which-

(A) shall govern the conduct of proceedings in the Office...

35 U.S.C. § 21(a) states:

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.

On November 9, 2001, 37 CFR 1.6(a)(2) stated:

Correspondence received in the Patent and Trademark Office is stamped with the date of receipt except as follows:

Correspondence filed in accordance with § 1.10 will be stamped with the date of deposit as "Express Mail" with the United States Postal Service.

On November 9, 2001, 37 CFR 1.10(a) stated²:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the USPTO receipt date as the filing date. See § 1.6(a).

On November 9, 2001, 37 CFR 1.10(b) stated:

Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked. Persons dealing indirectly with the employees of the USPS (such as by deposit in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked. The paper(s) or fee(s) that constitute the

¹ Manual of Patent Examining Procedure ("MPEP"), 8th Ed., (Aug. 2001) in effect on the requested filing date. Any changes made by later revisions are immaterial to the issues and the decision(s) in this case.

² The rules in effect on the requested filing date. Any changes effectuated in the relevant rules by subsequent final rulemakings are immaterial to the issues and the decision(s) in this case.

correspondence should also include the "Express Mail" mailing label number thereon. See paragraphs (c), (d) and (e) of this section.

On November 9, 2001, 37 CFR 1.10(d) stated:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Director to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or.

37 CFR 1.183 states:

In an extraordinary situation, when justice requires, any requirement of the regulations in this part which is not a requirement of the statutes may be suspended or waived by the Director or the Director's designee, *sua sponte*, or on petition of the interested party, subject to such other requirements as may be imposed. Any petition under this section must be accompanied by the petition fee set forth in § 1.17(h).

MPEP § 513 states in pertinent part:

The showing under 37 CFR 1.10(d) must be corroborated by (1) evidence from the USPS, or (2) evidence that came into being after deposit and within one business day of the deposit of the correspondence as "Express Mail." Evidence from the USPS may be the "Express Mail" Corporate Account Mailing Statement. Evidence that came into being within one day after the deposit of the correspondence as "Express Mail" may be in the form of a log book which contains information such as the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of entry in the log.

The reason the Office considers correspondence to have been filed as of the date of deposit as "Express Mail" is that this date has been verified by a disinterested USPS employee, through the insertion of a "date-in," or other official USPS notation, on the "Express Mail" mailing label. Due to the questionable reliability of evidence from a party other than the USPS that did not come into being contemporaneously with the deposit of the correspondence with the USPS, 37 CFR 1.10(d) specifically requires that any petition under 37 CFR 1.10(d) be corroborated either by evidence from the USPS, or by evidence that came into being after deposit and within one business day after the deposit of the correspondence as "Express Mail."

A petition alleging that the USPS erred in entering the "date-in" will be denied if it is supported only by evidence (other than from the USPS) which was:

(A) created prior to the deposit of the correspondence as "Express Mail" with the USPS (e.g., an application transmittal cover letter, or a client letter prepared prior to the deposit of the correspondence); or

(B) created more than one business day after the deposit of the correspondence as "Express Mail" (e.g., an affidavit or declaration prepared more than one business day after the correspondence was deposited with the USPS as "Express Mail").

On the other hand, a notation in a log book, entered after deposit by the person who deposited the correspondence as "Express Mail" within one business day of such deposit, setting forth the items indicated above, would be deemed on petition to be an adequate showing of the date of deposit under 37 CFR 1.10(d)(3).

37 CFR 1.10(d)(3) further provides that a party must show that correspondence was deposited as "Express Mail" before the last scheduled pickup on the requested filing date in order to obtain a filing date as of that date.

OPINION

Petitioners request reconsideration in view of the evidence already of record in conjunction with, *inter alia*, the concurrently filed third declaration of Ms. Lou Ann Cover ("Cover") executed September 24, 2003, and a communication from the USPS dated September 24, 2003, responding to petitioners' query as to any irregularities with the Express Mail service occurred on or about November 9, 2001.

With respect to the petition considered under 37 CFR 1.10(d):

Petitioners contend that the evidence of record and that further supplied with the instant petition adequately demonstrates that Ms. Cover deposited the instant correspondence with the Express Mail Service to Addressee so as to meet the requirements for relief under the provisions of 37 CFR 1.10(d).

Petitioners have failed to meet their burden of proving that the conditions of 37 CFR 1.10(d)(3) have been satisfied in this instance.

Specifically, 37 CFR 1.10(d)(3) provides that a party must show that the correspondence was deposited in the Express Mail Post Office to Addressee service of the USPS

prior to the last scheduled pickup for that day on the requested filing date. Since petitioners dealt indirectly with the USPS, they cannot produce the Express Mail mailing label receipt, and, as such, must rely upon corroborating evidence produced wholly within counsel's firm. In this situation, the regulation specifies that any corroborating evidence not supplied by the USPS must have come into being after the deposit in the Express Mail Post Office to Addressee service of the USPS but within one business day of the deposit of the correspondence in the Express Mail Post Office to Addressee service of the USPS. The only evidence of record that was came into being in that time period is, possibly, a client letter, and the firm's log book.

As to the client letter, the record does not make clear when on the date in question that letter was prepared. Ms. Cover declares that the time of the deposit of the instant correspondence was before 5 pm (see declaration of Ms. Cover executed July 1, 2002, at ¶ 4 and 6) and that the log book entry was made between 4 and 5 pm. It should be noted that if the client letter was prepared prior to deposit of the instant correspondence the USPTO has indicated it would not be acceptable corroborative evidence under the rule. See 65 Fed. Reg. 56439 at 56443 (Nov. 1, 1996). In any event, the client letter indicates counsel's intent to mail the instant correspondence on November 9, 2001, but does not corroborate that the instant correspondence was deposited in the Express Mail Post Office to Addressee service of the USPS, before the last scheduled pick up of Express Mail for that day.

The log book likewise fails to provide the necessary corroborative evidence that the instant correspondence was deposited in the Express Mail Post Office to Addressee service of the USPS. While petitioners contend that USPTO has never made clear why the log book has not been considered an adequate corroborative showing under the rule, the statements made in Ms. Cover's three declarations of record contain some of the information that should have been entered in the log book within one business day of the date of deposit. The USPTO has indicated that declarations supplying information such as the Express Mail number; the attorney docket number; the place, date, and time of deposit; the time of the last scheduled pick-up for that date; and the date and time of entry into the log; but prepared more than one business day after the date of deposit would not be considered acceptable. See 65 Fed. Reg. 56439 at 56443; MPEP 513. The only relevant information in the log book is the date and the attorney's docket number. The deficiencies in the log book were pointed out in the decision of May 30, 2002 (at 2); the decision of July 25, 2002 (at 1) and the decision of July 28, 2003 (at 2). The log book does not corroborate that the instant correspondence was deposited in the Express Mail Post Office to Addressee service of the USPS, before the last scheduled pick up of Express Mail for that day. Indeed, as explained more fully *infra*, the record now shows that the instant correspondence was not deposited in the Express Mail Post Office to Addressee service of the USPS in the first instance; rather, it was deposited as regular mail.

While the declaration of Ms. Cover (executed September 24, 2003) indicates the last scheduled pickup on the date in question was 5 p.m., this is for regular mail; as Ms. Cover also attests that the correspondence was placed in a regular mail drop box. See *id.*, ¶ 1. Ms. Cover does not attest that the instant correspondence was deposited in an Express Mail drop box, much less before its last scheduled pick up. However, the corroborated showing required by 37 CFR 1.10(d)(3) is the date and time the correspondence "was deposited in the "Express Mail Post Office to Addressee" service of the USPS", not in the regular mail. The record is silent as to the last scheduled pickup for Express Mail on the date in question, and, in any event, such is immaterial as the instant correspondence was not properly deposited as Express Mail with the USPS.

The criticality of an application filing date was considered adequate to justify independent verification by an employee of the USPS of the date of deposit of the application papers with the USPS. See rulemaking entitled "Revision of Patent Procedure," published in the *Federal Register* at 48 *Fed. Reg.* 2696, 2702 (January 20, 1983), and reprinted in the Patent and Trademark Office *Official Gazette* at 1027 *Off. Gaz. Pat. Office* 9, 25 (February 1, 1983). Put otherwise, independent corroboration of the date and time of deposit as the Express Mail to Addressee service provided by the U.S. Postal Service is the *raison d'être* of 37 CFR 1.10. However, Ms. Cover states (declaration executed September 23, 2003, at ¶ 1) that the mailing of the instant correspondence was performed "by depositing the application with the regular USPS mail drop box located at 19 S. LaSalle Street, Chicago, Illinois." Such does not constitute mailing the correspondence as Express Mail within the meaning of 37 CFR 1.10, as Ms. Cover admittedly failed to use an Express Mail drop box, which is a drop box dedicated to correspondence mailed under the Express Mail Service of the USPS. Rather, Ms. Cover deposited the instant correspondence in a regular mail drop box, and, in so doing, also admittedly failed to deal directly with an employee of the USPS. It is noted that the importance for those who rely upon the Express Mail procedure to be aware of USPS schedules and the specific use of an Express Mail drop box dates back to the final rulemaking published on January 20, 1983, at 48 *Fed. Reg.* 2696-2714 and on February 1, 1983, at 1027 *Off. Gaz. Pat. & TM Office* 9, which implemented 37 CFR 1.10 to promulgate 35 U.S.C. § 21(a). The following comment appeared therein:

Comment: One person questioned what treatment will be accorded a paper placed in an 'Express Mail' box receptacle after the box has been cleared for the last time on a given day.

Reply: The paper will be considered to be deposited as of the date of receipt indicated on the 'Express Mail' mailing label by the Postal Service clerk.

Registered practitioners and the general public were advised at the time § 1.10 was originally promulgated of the Director's interpretation of the language adopted in the final rulemaking. The Director (then Commissioner) clearly stated that any correspondence placed in an Express Mail drop box, but after the box had been cleared for the last time on a given day, would be considered to be deposited as of the date of receipt indicated on the Express Mail mailing label by the Postal Service clerk. This interpretation was published in both the *Federal Register* and in the *Official Gazette* in 1983. In addition, the notice of final rulemaking, as well as the supplemental information, was republished on numerous occasions in the *Official Gazette* (e.g., see 1086 *TM Off. Gaz.* 108 (January 5, 1988); 1098 *TM Off. Gaz.* 110 (January 3, 1989); 1110 *Off. Gaz. Pat. & TM* 104 (January 2, 1990); and 1122 *TM Off. Gaz.* 102 (January 1, 1991)).

Of more significance here is the long standing requirement that an Express Mail box receptacle be employed by the person attempting to mail the correspondence as Express Mail under 37 CFR 1.10, when dealing indirectly with the USPS. This is reinforced by consideration of 61 *Fed. Reg.* 56439 at 56445 (Nov. 1, 1996), reprinted at 1192 *Off. Gaz. Pat. & TM Office*, (Nov. 26, 1996) (response to comment 9):

Section 1.10(b) has been amended so that direct deposit of correspondence with the USPS is a recommendation, rather than a requirement. While the Office strongly urges direct deposit of Express Mail correspondence in order to

obtain a legible copy of the Express Mail mailing label, parties are not precluded from using Express Mail drop boxes...

See also id. at 56445-46:

Comment 12: One comment requested clarification concerning whether deposit of correspondence in the Express Mail drop box must be done prior to the last scheduled pickup of the day in order to be entitled to the deposit date as the filing date of the correspondence.

Response: Correspondence sent by the "Express Mail Post Office to Addressee" service is considered filed in the Office on the "date-in" entered by the USPS....Section 1.10(d) permits the Office to correct a USPS "date-in" error when the correspondence is deposited in an Express Mail drop box prior to the last scheduled pickup of the day, that is, the time clearly marked on the Express Mail drop box including when the box will be cleared for the last time on the date of deposit. Section 1.10(d) sets forth the procedures to be followed to be entitled to such a correction.

Since an Express Mail drop box was not employed to deposit the instant correspondence with the USPS, then petitioners cannot successfully urge that the instant correspondence was deposited in the Express Mail Post Office to Addressee service of the USPS within the meaning of 37 CFR 1.10(d). See Nitto Chemical Industry Co. Ltd. v. Comer, 39 USPQ 1778, 1781-82 (D.D.C. 1994)(consignment of Express Mail correspondence to a first class mail bin at the USPS does not properly entrust the correspondence to the custody of the USPS for purposes of 37 CFR 1.10). Since petitioners did not deposit the instant correspondence in the Express Mail Post Office to Addressee service of the USPS, the Office is not permitted, under the terms of 37 CFR 1.10(d), to correct the alleged "date-in" error of the USPS in this instance.

With respect to the petition considered under 37 CFR 1.183:

In the alternative, petitioners seek under 37 CFR 1.183 waiver of the requirements of 37 CFR 1.10(d).

In order for grant of any petition under 37 CFR 1.183, petitioners must show (1) that this is an extraordinary situation where (2) justice requires waiver of the rule. See In re Sivertz, 227 U.S.P.Q. 255, 256 (Comm'r Pat. 1985). The record does not show that either condition exists in this case.

Petitioners acknowledge that they have not received the mailing label for the instant correspondence from the USPS. 37 CFR 1.10(b) does not require that correspondence be directly entrusted to an employee of the USPS, but contains the caveat that persons dealing, as here, indirectly with the USPS assume the risk of not receiving an Express Mail mailing label with the desired "date-in" clearly marked. Nevertheless, as a condition of dealing indirectly with the USPS applicants must, under the terms of the rule, deposit the correspondence in the Express Mail Post Office to Addressee service of the USPS, a circumstance that did not occur in this instance. See Nitto, supra. Accordingly, petitioners have failed to advance a reasonable basis for waiver of the requirements of 37 CFR 1.10(d).

The failure to properly deposit the instant correspondence in the Express Mail Post Office to Addressee service of the USPS by depositing the correspondence in a regular

mail drop box is an avoidable oversight that could have been avoided by the exercise of reasonable due care and diligence. See Nitto, supra (failure to obtain Express Mail mailing label receipt directly from USPS, and depositing Express Mail correspondence in a first class mail bin, does not constitute an extraordinary situation such that justice requires waiver of the rules); Honigsbaum v. Lehman, 903 F.Supp. 8, 37 USPQ2d 1799 (D.D.C. 1995)(waiver of the rules not warranted where applicant failed to produce Express Mail customer receipt or any other evidence showing that application was actually deposited with the USPS as Express Mail), *aff'd without opinion*, 95 F.3d 1166 (Fed Cir. 1994). Here, the record shows that the instant correspondence was deposited in a regular mail box, not an Express Mail drop box, with the USPS. Notice of how to comply with the requirements of 37 CFR 1.10 has been, as noted above, well, and often, publicized.³ As such petitioners knew or should of known, how to properly deposit the instant correspondence with the USPS under the provisions of 37 CFR 1.10 so as to obtain, if needed, the remedial benefits of the rule. Failure to comply with the requirements of a rule, when such failure is not due to circumstances beyond a party's control, is not a reasonable basis for seeking waiver of a rule. Equitable powers should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable due care and diligence. U.S. v. Lockheed Petroleum Services, 709 F.2d 1472, 1475 (Fed. Cir. 1983)

Whether the instant correspondence was properly deposited in the Express Mail Post Office to Addressee service of the USPS under the terms of 37 CFR 1.10 was a circumstance entirely within the control of petitioners, which weighs against granting the request for relief. See Vincent v. Mossinghoff, 230 USPQ 621, 625 (D.D.C. 1985)(petitioner's failure to heed published notice of USPTO procedures will not be permitted to shift, in equity, his lack of diligence onto the USPTO); Honigsbaum, supra; Nitto, supra. Even assuming, *arguendo*, that clerical inadvertence or mistake led to petitioners' failure to properly file the instant correspondence as Express Mail with the USPS, such is not a grounds for requesting, or expecting, waiver of the regulations. See In re Kabushiki Kaisha Hitachi Seisakusho, 39 USPQ2d 1319, 1320 (Comm'r Pat. 1994) (clerical error causing delay leading to a loss of right does not justify suspension of the rules); Nitto, supra (courier's failure to properly deposit applicant's correspondence as Express Mail with the USPS does not justify waiver of the rules).

Petitioners seek to distinguish USPTO reliance on Honigsbaum, supra, and Nitto, supra, in deciding the previous petitions adversely. Nevertheless, in addition to petitioners' failure to properly deposit the instant correspondence in the Express Mail Post Office to Addressee service of the USPS, petitioners' failure to make and maintain adequate and timely business records to corroborate the showing required by 37 CFR 1.10(d) is an oversight that could have been avoided by the exercise of reasonable care and diligence, and, as such, is not seen to justify waiver of the rule. See Honigsbaum, supra; Nitto, supra.

³ Because the USPTO regulations are published in the *Federal Register* as required by the Federal Register Act, 44 U.S.C. §1505 (formerly 44 U.S.C. §§ 5, 7), they are binding, even in the absence of actual knowledge. See, e.g., Timber Access Industries Co. v. United States, 213 Ct. Cl. 648, 553 F.2d 1250, 1255 (1977); Andrews v. Knowlton, 509 F.2d 898, 905 (2d Cir.), *cert. denied*, 423 U.S. 873 (1975); United States v. Aarons, 310 F.2d 341, 345-48 (2d Cir. 1962); In re Pacific Far East Line, Inc., 314 F.Supp. 1339, 1348 (N.D. Cal. 1970), *aff'd*, 472 F.2d 1382 (9th Cir. 1973).

Petitioners further point to In re Bachler, 229 USPQ 553 (Comm'r Pat. 1986), and Sturzinger v. Commissioner, 377 F.Supp 1284, 181 USPQ 436 (D.D.C. 1974), in support of their request for extraordinary relief. However, neither Bachler nor Sturzinger is seen to demonstrate that the instant situation is an extraordinary one, where justice requires waiver of the rules.

In Bachler, the extraordinary relief was predicated on petitioner's reasonable showing that the missing correspondence was intended to be properly deposited in the USPTO drop box at the Department of Commerce, along with other papers that were received, and as such, the apparent loss of the correspondence was a circumstance beyond the control of petitioner. Here, the instant correspondence was not lost subsequent to deposit with the USPS, nor does the instant record reasonably show that the instant correspondence was in fact properly entrusted to the custody of the USPS in the Express Mail to Addressee service of the USPS. But see Nitto, supra. The Commissioner specifically noted (229 USPQ at 554):

Further, the present situation differs from a situation in which timely filing of papers is governed by statute rather than by PTO rules. If this were a situation where the papers were required to be present on a particular date in order to receive that date no relief could be granted since, as pointed out above, the evidence does not establish that the papers were in fact timely filed.

Here, there is a statutory requirement that the instant correspondence had to have been received at the USPTO on November 9, 2001, in order to receive that date as the filing date of a provisional application. See 35 U.S.C. § 111(b)(4):

The filing date of a provisional application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office.

It is well settled that the use of "shall" in a statute is the language of command, and where the directions of a statute are mandatory, then strict compliance with the statutory terms is essential. Farrel Corp. v. U.S. Int'l Trade Comm'n, 942 F.2d 1147, 20 USPQ2d 1912 (Fed. Cir. 1991). Since the filing date of a provisional application for patent is governed by statute, an Executive Branch agency like the USPTO must follow the strict provisions of the applicable statute. See A. F. Stoddard v. Dann, 564 F.2d 556, 566, 195 USPQ 97, 105 (D.C. Cir 1977). As petitioners did not properly employ the Express Mail Post Office to Addressee service of the USPS, the instant correspondence cannot be regarded as having been received at the USPS on November 9, 2001, within the meaning of 35 U.S.C. § 21(a) and 37 CFR 1.10, the earliest filing date permitted by § 111(b)(4) is the date of receipt of the instant correspondence at the USPTO: December 12, 2001. It follows that Bachler does not support petitioners' request for waiver of the rules.

Likewise, Sturzinger does not warrant waiver of the rules so as to accord petitioners a filing date of November 9, 2001. The Sturzinger court granted, in equity, a filing date due to the loss of the application papers while in the possession of the USPS, which, of course, was a circumstance beyond the control of the applicant. However, as noted above, whether and when the instant correspondence was properly entrusted to the custody of the USPS in the Express Mail Post Office to Addressee service of the USPS was a circumstance entirely within the control of petitioners. If the instant application papers had been properly deposited in the custody of the USPS under the Express Mail Post Office to Addressee service of the USPS, and were subsequently lost while in, or

subsequent to, the custody of the USPS, then petitioners would have relief under the provisions of 37 CFR 1.10(e); no waiver of the rules would be required. Likewise, if petitioners did not properly deposit the instant correspondence in the Express Mail Post Office to Addressee service, and the papers were not received by the USPTO, petitioners could not reasonably expect waiver of the rules to excuse their lack of performance of the condition of proper deposit in the Express Mail Post Office to Addressee service of the USPS in the first instance, as such could be avoided by the exercise of reasonable care and diligence. See Lockheed, supra. In any event, petitioners appear to overlook that the filing date accorded to the Sturzinger application was not the date the application papers were first asserted to have been entrusted to the USPS, or some intermediate date that the papers were assertedly within the possession of the USPS. Rather, the filing date actually accorded the Sturzinger application (April 13, 1971,) was in fact the first date of receipt in the USPTO of copies of the originally mailed application papers, which was April 13, 1971. See Sturzinger, 229 USPQ at 537. Thus, to the extent Sturzinger is relevant to the instant situation, Sturzinger indicates the instant filing date must remain December 12, 2001, the earliest date the instant provisional application papers were first received at the USPTO.

DECISION

The request for reconsideration under 37 CFR 1.10(d) is granted to the extent that the petition has been reconsidered but is **denied** with respect to according the above-identified application a filing date of November 9, 2001.

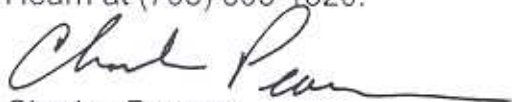
The request for reconsideration of the petition for waiver of 37 CFR 1.10(d)(3) under 37 CFR 1.183 so as to accord the above-identified provisional application a filing date of November 9, 2001 is granted to the extent the petition has been reconsidered but is **denied** as to waiver. The provisions of 37 CFR 1.10(d)(3) will not be waived or relaxed in this instance.

The filing date of the above-identified provisional application remains December 12, 2001.

This decision may be considered a final agency action within the meaning of 5 U.S.C. § 701 *et seq.* for purposes of seeking judicial review. See MPEP 1002. The Office will not further consider or reconsider this matter.

This provisional application is being forwarded to the Files Repository.

Telephone inquiries related to this decision may be directed to Petitions Examiner Brian Hearn at (703) 305-1820.



Charles Pearson
Director, Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy